MAJLIS AGAMA ISLAM NEGERI PULAU PINANG A

v.

ZAITUN RAMLI

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
ZAINUN ALI JCA
HASAN LAH JCA
[CIVIL APPEAL NO: P-02-219-02]
11 SEPTEMBER 2008 C

LAND LAW: *Indefeasibility of title and interests - Registered owner - Transfer - Whether registration valid - Fraud or misrepresentation - Sale and purchase agreement - Consideration - Purchaser in good faith - National Land Code, s. 340* D

Upon the death of one Che Dun Lebai Mamat on 2 December 1974, the registered owner of one half share of a piece of land, the Syariah Court of Kepala Batas ordered that the deceased's half share be transferred to the appellant. The appellant realised later that the respondent was the new registered owner of the land and brought an action seeking a declaration that the registration of the respondent as the new owner was null and void. However, nothing was stated in the appellant's supporting affidavit of whether the respondent was aware of any dealing pertaining to the land or had collaborated with the previous registered owner in the transaction. It was a bare supporting affidavit with no indication of the respondent's culpability. The respondent, on the other hand, affirmed that she had executed a sale and purchase agreement dated 25 August 1997 with one Dun Man, who was then the registered owner of the land, for a sum of RM30,000 and thereafter became the new registered owner for value. She thereupon prayed for the dismissal of the appellant's action. The trial judge found for the respondent and dismissed the application, resulting in the present appeal by the appellant. E F G H

Held (dismissing the appeal)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) It was clear that the respondent was now the registered owner and unless the appellant could prove that she was a party or privy to fraud or misrepresentation, she thus had a I

good title against the whole world. Even if fraud existed, it was never established against anybody; even if forgery had been committed by Dun Man it was never affirmed in the affidavit in support. The appellant's supporting affidavit was silent as to the active commission of fraud or misrepresentation by the respondent or her agent. Further, there was no affirmation by the appellant alleging that the respondent was not a purchaser of good faith. In fact, the only impression created by the appellant was that the respondent's conduct and mindset was unblemished and had remained so up to the day of registration. The sale and purchase agreement established beyond doubt that the transaction was for valuable consideration *ie*, for RM30,000. Unless the demands of s. 340 of the National Land Code were met the respondent's title would stay. The appellant had failed here as the evidence showed that it was conspicuously obvious that this was a shoddy attempt at wanting to deregister the respondent as the rightful owner. There was nothing in the evidence to prove that the contract between Dun Man and the appellant was illegal and, hence, void and unenforceable. (paras 13, 14 & 15)

Bahasa Malaysia *Translation Of Headnotes*

Selepas kematian seorang yang bernama Che Dun Lebai Mamat pada 2 Disember 1974, iaitu tuan punya berdaftar bagi setengah bahagian sebidang tanah, Mahkamah Syariah Kepala Batas memerintah bahawa setengah bahagian itu dipindah ke perayu. Perayu kemudiannya sedar bahawa responden merupakan tuan punya berdaftar baru tanah tersebut dan memulakan tindakan untuk memperolehi sesuatu deklarasi bahawa pendaftaran responden sebagai tuan punya adalah batal dan tak sah. Walau bagaimanapun, tidak ada apa-apa yang dinyatakan di dalam afidavit penyokong perayu sama ada responden sedar tentang apa-apa perjanjian mengenai tanah tersebut ataupun telah bekerjasama dengan tuan punya berdaftar sebelumnya dalam urus niaga tersebut. Ia merupakan sesuatu afidavit penyokong kosong tanpa apa-apa indikasi terhadap kebersalahan responden. Responden, sebaliknya, mengesahkan bahawa beliau telah melaksanakan sesuatu perjanjian jual beli bertarikh 25 Ogos 1997 dengan seorang yang bernama Dun Man, yang merupakan tuan punya berdaftar tanah tersebut pada masa itu, untuk jumlah wang sebanyak RM30,000 dan selepas itu menjadi tuan punya berdaftar yang wajar. Beliau selepas itu memohon supaya tindakan perayu ditolak.

Hakim perbicaraan membuat keputusan yang berpihak kepada responden dan menolak tindakan tersebut, mengakibatkan rayuan ini dibuat oleh perayu.

Diputuskan (menolak rayuan)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Ia adalah jelas bahawa responden kini merupakan tuan punya berdaftar dan melainkan perayu dapat membuktikan bahawa beliau adalah pihak atau bersubahat ke fraud atau salah nyataan, beliau mempunyai hakmilik bagus terhadap seluruh dunia. Jika fraud wujud pun, ia tidak dibuktikan terhadap sesiapa pun; jikapun pemalsuan telah dilakukan oleh Dun Man ia tidak pernah diesahkan di dalam afidavit penyokong. Afidavit penyokong perayu tidak menyatakan apa-apa mengenai pembuatan aktif fraud atau salah nyataan oleh responden atau agennya. Tambahan lagi, tiada apa-apa pengesahan oleh perayu mengatakan bahawa responden bukan seorang pembeli yang suci hati. Sebenarnya, tanggapan yang ditimbulkan oleh perayu ialah bahawa kelakuan dan fikiran responden tidak cemar langsung dan kekal sebegitu sehingga hari pendaftaran. Perjanjian jual beli tersebut membuktikan tanpa apa-apa keraguan bahawa urusniaga tersebut dibuat untuk balasan berharga, iaitu, untuk RM30,000. Melainkan keperluan s. 340 Kanun Tanah Negara disempurnakan hakmilik responden akan kekal. Perayu di sini telah gagal kerana keterangan menunjukkan dengan jelas ketara bahawa ini merupakan cubaan hina untuk membatalkan pendafataran responden sebagai tuan punya yang betul. Tidak ada apa-apa dalam keterangan untuk membuktikan bahawa kontrak di antara Dun Man dan perayu adalah menyalahi undang-undang dan, oleh itu, tak sah dan tidak boleh dikuatkuasakan.

Case(s) referred to:
Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Bank Pertanian Malaysia v. Blue Valley Plantation Bhd & Ors [2002] 8 CLJ 100 HC ***(refd)***

Legislation referred to:
National Land Code, s. 340
Rules of the High Court 1980, O. 19 r. 5(1)

For the appellant - Andrew Teh (Foong Mun Yee with him); M/s Wong Lu Peen & Tunku Alina
For the respondent - Jasvinjit Singh; M/s AJ Ariffin Yeo & Harpal

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-606-1999]

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appeal was brought before us by the Majlis Islam Negeri Pulau Pinang (hereinafter referred to as the appellant), but despite the non-presence of the respondent, and despite the respondent's defence having been struck out earlier, we still dismissed it. The reasons are manifold but to understand fully the issue at hand a need arises for us to reproduce the facts of the case.

[2] One Che Dun binti Lebai Mamat was the registered owner of one half share of a piece of land referred to as Lot 2561, Mukim 4, Daerah Seberang Perai Utara, Pulau Pinang (hereinafter referred to as the land). She then passed away on 2 December 1974. On 5 April 1999 the Syariah Court of Kepala Batas pursuant to a *faraid* order meted down the order that the deceased's half share of the land be transferred to the appellant.

[3] The appellant then realised later that sitting on the land was a new registered owner ie, the defendant (hereinafter referred to as the respondent). Being aggrieved the appellant filed a writ and statement of claim on 4 August 1999 against the respondent and successfully served them on her on 30 August 1999. Amongst others, the appellant prayed that the registration of the respondent as the registered owner, be declared void and the appellant be registered as the new registered owner. The respondent thereupon filed her notice of appearance and defence.

[4] The appellant thereafter filed a summons in chambers, *inter alia* praying for a striking out of the respondent's defence for being out of time, and a declaration that the registration of the respondent as the new owner be declared null and void. Before the senior assistant registrar the appellant was successful in striking out the defence. For some unknown reason no appeal was filed against this part of the order. As for the declaration application the matter was dealt with by the learned High Court judge.

[5] A scrutiny of the appellant's supporting affidavit merely affirmed that:

i. the person who affirmed the supporting affidavit was an officer of the appellant;

ii. a writ of summons and statement of claim were served on the respondent;

iii. the respondent had filed a notice of appearance but had filed an out of time defence; and

iv. the Syariah Court of Kepala Batas had given the share of Che Dun binti Lebai to the appellant.

[6] Nothing was stated in this supporting affidavit, of whether the respondent was aware of any dealing pertaining to the land, or had collaborated with the previous registered owner in the transaction. It was a bare supporting affidavit with no indication of the respondent's culpability.

[7] The gaps in relation to the land were filled up by the respondent's affidavit in reply. She had affirmed that she had executed a sales and purchase agreement dated 25 August 1997 with one Dun binti Man, who was the then registered owner of the land, for a sum of RM30,000. Thereafter on 19 December 1998 she became the new registered owner for value. At para 9 of her affidavit she stated that she had no idea that Che Dun binti Lebai Mat had died way back on 2 December 1974. As far as she was concerned Dun binti Man was the rightful registered owner and the sale was *bona fide*. In a word she was a *bona fide* purchaser with value without notice of any defective title. In the alternative she had indicated that she had no idea whether Che Dun binti Lebai Mat and Dun binti Man were two different people. She thereupon prayed that the summons in chambers be dismissed with costs.

[8] A perusal of the statement of claim likewise told a similar story as that affirmed by the appellant's supporting affidavit in the summons in chambers. Nothing in the statement of claim indicated that the respondent knew Dun binti Man was not the original registered owner, or had conspired with her, to defeat the legal rights of the deceased.

[9] Not surprisingly the learned judge had dismissed the application with costs. Being dissatisfied the appellant filed an appeal, hence the matter before us.

[10] At the hearing date the respondent was not present despite being informed of the appeal. Even her counsel was not present. Not a shred of evidence was made available to us to explain their respective absence. As they had been sufficiently informed we proceeded on with the merits of the appeal.

[11] The appellant had submitted that the learned judge was wrong in law in dismissing the appellant's application as the learned judge did not consider the order of 21 August 1999 made by the senior assistant registrar, which had struck out the respondent's statement of defence. The effect was that the respondent was left with no defence at that material time. Pursuant to O. 19 r. 5(1) of the Rules of the High Court 1980, the appellant thus was entitled to enter judgment for possession as prayed in prayer 2 of the summons in chambers. This provision reads:

> **5 Default of defence: Claim for possession of immovable property (O. 19 r. 5)**
>
> (1) Where the plaintiffs claim against a defendant is for possession of immovable property only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, and on producing a certificate by his solicitor, or (if he sues in person) an affidavit, stating that he is not claiming any relief in the action of the nature specified in Order 83 rule 1, enter judgment for possession of the immovable property as against that defendant and for costs, and proceed with the action against the other defendants, if any.
>
> (2) ...

[12] In the course of it the court became increasingly aware of the flaws in the case of the appellant. To begin with, no action was undertaken by the appellant under the statement of claim, to obtain a default judgment against the respondent for want of defence after the senior assistant registrar had struck out the defence. Instead the appellant wanted a judgment in default of the prayers in the statement of claim through the summons in chambers.

[13] It was also crystal clear that the respondent was now the registered owner, and unless the appellant could prove that she was a party or privy to fraud or misrepresentation, she thus had a good title against the whole world (s. 340 of the National Land Code 1965; *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133). This provision of s. 340 reads as follows:

> **340 Registration to confer indefeasible title or interest, except in certain circumstances**
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> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy;
>
> (b) ...
>
> (c) ...
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

A Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

B **[14]** Even if fraud existed it was never established against anybody; and even if forgery had been committed by Dun binti Man it was never affirmed in the affidavit in support. As mentioned above, the supporting affidavit of the appellant was silent as to the active commission of fraud or misrepresentation by the respondent or her agent. Further there was no affirmation by C the appellant alleging that the respondent was not a purchaser of good faith. In fact the only impression created by the appellant was that the conduct and mindset of the respondent was unblemished and had remained so up to the day of the registration. The sales and purchase agreement established beyond D doubt that the transaction was for valuable consideration ie, for RM30,000. Unless the demands of s. 340 of the National Land Code 1965 were met the title of the respondent stays. Here the appellant had failed, as from the evidence it was conspicuously obvious that this was a shoddy attempt at wanting to deregister E the respondent, as the rightful owner.

[15] Should the court allow the appeal when the respondent was not present during the appeal compounded further by the want of defence? To address this question, the easiest way to resolve it is F to pose the supplementary and hypothetical question of what if the learned trial judge had allowed the appellant's application. Were a consequential hypothetical appeal brought before the Court of Appeal, the appeal would certainly be allowed, on the simple ground that the facts would point to the futility of the G application. From the prognosis of the facts, as carried out above, it was well nigh impossible for the applicant to establish, on a balance of probability, the basic ingredient of the respondent possessing a culpable mind, or at worst being aware that Dun binti Man possessed a defective title *(Bank Pertanian Malaysia v.* H *Blue Valley Plantation Bhd & Ors* [2002] 8 CLJ 100; *Adorna Properties Sdn. Bhd. v. Boonsom Boonyanit* [2001] 2 CLJ 133). There was nothing in the evidence to point to the contract between Dun binti Man and the appellant to be contaminated and illegal and hence void and unenforceable (*Singma Sawmill Co Sdn* I *Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* (Malaysian

Case Law Library on CD-ROM- 1999: Release 3 of 31; *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75). At the appeal stage the hypothetical order, it being bad, would almost certainly be set aside.

[16] With that vivid scenario staring at us, and justice being uppermost in our mind, the correct position to take was to carry on with the appeal, with or without the presence of the respondent. Down below, the learned trail judge after having heard both parties and having weighed the evidence, had correctly found for the respondent. The situation was no different before us. The application regretfully lacking in evidence, and the non-presence of the respondent not guaranteeing an automatic win, we had no compunction in dismissing the appeal.